Filed 2/24/12 In re Davis CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re BRUCE DAVIS on Habeas Corpus.	B235231 (Los Angeles County Super. Ct. No. BH007527)

APPEAL from an order of the Superior Court of Los Angeles County, Patricia Schnegg, Judge. Reversed.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Julie A. Malone and Charles Chung, Deputy Attorneys General, for Appellant Terry Gonzalez, Warden of the California Men's Colony in San Luis Obispo.

Michael Evan Beckman for Respondent Bruce Davis.

Terry Gonzalez, Warden of the California Men's Colony in San Luis Obispo, appeals from the superior court's order granting the petition of Bruce Davis for a writ of habeas corpus and vacating the Governor's reversal of the Board of Parole Hearings' (the Board) decision to parole him. We conclude that some evidence supports the Governor's order to deny parole and reverse the superior court's order. Davis is the respondent on this appeal.

FACTUAL AND PROCEDURAL SUMMARY

In the summer of 1969, respondent was 26 years old and a member of Charles Manson's cult known as "the Family." The Family lived at the Spahn ranch, and respondent participated in its various activities, including the murders of Gary Hinman and Donald "Shorty" Shea.

Respondent was present during discussions of Hinman as a person who had money that could be used to finance Manson's plan to take the Family to the desert. On the evening of July 25, 1969, respondent was seen in the company of Manson and Robert Beausoleil. Beausoleil was wearing a sheathed knife, and respondent was holding a 9-millimeter Radom gun he had bought under a false name. Respondent drove Beausoleil, Mary Brunner, and Susan Atkins to Hinman's house and returned to the ranch. Two days later, Manson received a phone call message that Hinman "was not cooperating." Respondent claims not to have understood what that meant although he admits he understood that a robbery was underway.

Manson asked respondent to drive him to Hinman's house. When they arrived, Hinman already had been struck with a gun in a scuffle during which the gun had fired. Respondent took the gun away from Beausoleil, and later told another Family member that he had the gun pointed at Hinman while Manson sliced Hinman's face open with a sword, from his left ear to his chin. Hinman was then put in bed. He was bleeding and appeared to lose consciousness at times. Respondent drove one of Hinman's cars back to

the ranch, claiming Hinman was still alive when he left.[1] Hinman's badly decomposed body was discovered on July 31, 1969. The cause of death was a stab wound that penetrated his heart. There were additional stab wounds, and a tear of the skin of the scalp. A bullet recovered from a hole underneath the kitchen sink could have been fired from the gun respondent had bought. The words "Political Piggy" and an animal footprint appeared in blood on the wall. A week later, Beausoleil was arrested in one of Hinman's cars.

In August 1969, respondent was present when Manson discussed his belief that Shea, who worked at the Spahn ranch, was a police informant and was helping a neighboring owner clear the Family off the land. One night, respondent, Manson, Charles "Tex" Watson, and Steven "Clem" Grogan were seen surrounding Shea. They took him to a ravine, where he was repeatedly stabbed. Respondent has admitted that he knew Shea was going to be killed, but maintains that when Manson ordered that he cut Shea's head off with a machete, he refused, and only cut Shea on the shoulder after Manson handed him a knife.

When Manson recounted the details of the murder to other Family members, he said that they had stabbed Shea repeatedly and that Shea was "'real hard' to kill until we brought him to 'now.'" (In Family speak, "now" meant absence of thought.) Respondent agreed with this version of the murder and said, "Yeah, when we brought him to now, Clem cut his head off," adding, "That was far out." In response to a newspaper article about a witness's testimony at Beausoleil's trial, respondent reportedly claimed that the Family had ways of taking care of snitches and had already taken care of one. Referring to Shea's murder, respondent said, "We cut his arms, legs and head off and buried him on the ranch." Shea's body was discovered years later when it could no longer be determined whether he had been decapitated.

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[1] At Manson's separate trial, it was established that Brunner, Atkins, and Beausoleil remained at Hinman's house for two more days while Hinman lay bleeding, until Beausoleil stabbed him in the chest and smothered him with a pillow. (*People v. Manson* (1977) 71 Cal.App.3d 1, 17-18.)

Respondent was arrested in 1970 after spending over a year on the run. He was convicted of two counts of first degree murder and conspiracy to commit murder and robbery. At sentencing, the court stated that respondent had knowingly and willingly aided and abetted Hinman's murder and had actively participated in Shea's "peculiarly vicious" murder. The court also stated respondent knew the Family's intent and purpose; he was older than most of the other Family members, more educated than they, and therefore not "a dupe." Respondent was separately convicted of the federal crime of presenting false identification to obtain a firearm. He has been eligible for parole since 1977.

Respondent's most recent psychological evaluation was in 2009. The evaluator diagnosed him with cannabis and hallucinogen abuse disorders that were in sustained or full remission in a controlled setting. The evaluator pointed out that respondent claimed to have used various drugs and that he used mescaline and LSD "by the handfuls" when he was with the Family. He recognized that drugs loosened his moral values, and reduced his inhibitions. He stopped using drugs in 1974, around the time he became a Christian. The evaluator also diagnosed respondent with a personality disorder not otherwise specified, with narcissistic and anti-social features based on his long-standing life pattern of "grandiosity and need for admiration as well as a pattern of deceitfulness, impulsivity and irresponsibility." The evaluator concluded that respondent posed a low risk of violence, likely to increase if he returned to using intoxicants, associated with antisocial peers, possessed a weapon, found himself without a stable residence, lacked income sufficient to meet his living expenses or had inadequate social support within the community.

Respondent has been slow to acknowledge his participation in the murders, and over the years accepted only limited responsibility, claiming that he played a minor role and rationalizing his behavior. At his last parole hearing, in 2010, he initially refused to talk about his life crimes. Instead, he provided a written statement, in which he claimed that after the Board denied parole in 2008 he came to understand he had deceived himself about his role in the murders, had refused to accept responsibility for the things he did by

focusing on what he did not do and justification for his actions. Thus, he acknowledged minimizing his role by claiming that he did not plan the murders and did not want them to happen; he did not murder anyone; he did not shoot Hinman but only drove the car and held the gun; and he did not want to cut Shea but did so to avoid conflict with Manson. He claimed to have finally understood that his actions showed he was "an equal and willing participant." He stated further: "I had not only done dreadful things, but I also influenced others to participate in horrible crimes," by being "a willing participant in the crimes and in the cult." He expressed remorse and apologized to the Hinman and Shea families.

The presiding Board commissioner was disappointed that respondent's statement did not "clear up further some discrepancies," and that he "dance[d] around" what his role in the murders really was. Respondent then agreed to answer specific questions. In response to the commissioner's expression of doubt that respondent only passively poked Shea in the shoulder rather than stabbing him as others had done, respondent restated his version of Shea's murder—he had unwillingly participated only after Manson urged him to join the others who already had began stabbing Shea, he dropped the machete Manson had given him to cut Shea's head, and he only cut Shea in the shoulder out of fear for his own life. He did not know or care whether Shea was dead or alive at the time.

In closing, the district attorney discussed the two murders in the context of Manson's plan to start a race war.[2] He read into the record a letter by a former Family

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[2] "Manson believed that the Beatles in their song, 'Helter Skelter,' were warning him of an impending bloody, civilization-ending, worldwide race war between Blacks and Whites. During this war, Manson and his followers would hide in a bottomless pit in Death Valley. Manson foretold that the Blacks would succeed in their 'revolution,' but that the Family would emerge from the pit to take control and restore order. Manson came to believe that he would have to precipitate the race war by murdering Whites in the way he thought Blacks would do it in the race war and in such a way that Blacks would be blamed for the murders. [Citation.]" (*In re Van Houten* (2004) 116 Cal.App.4th 339, 344, fn. 1, citing *People v. Manson* (1976) 61 Cal.App.3d 102, 129-130, 131, 139-140.) Manson envisioned writing the word "Pig" or smearing the victims' blood on walls as part of these murders. (*People v. Manson*, at p. 140.)

member who claimed that preparation for this race war was an integral part of the Family's daily life and the murders in which respondent was involved were a part of it. As to Hinman's murder, the district attorney emphasized that respondent not only drove Hinman's attackers to his house but also provided the gun. He noted that respondent had admitted that he may even have pointed the gun at Hinman while Manson slashed Hinman's ear. The district attorney contrasted respondent's insistence that he reluctantly participated in Shea's murder with his boastful remarks in the days after the murder and his expressed desire to protect the Family from damaging testimony during Beausoleil's trial.

Respondent was allowed to personally rebut the district attorney's statement. He explained he was emotionally immature when he joined the Family. Manson treated him with what he thought was respect, and he had access to drugs, sex, and cars, which was all he wanted. He did not believe Manson's race war would happen the way Manson said it would, but he did not care that Manson wanted everybody to die. Respondent said he "bragged about it all. Yeah, we cut Shorty's head off. Yeah, I wanted to be impressive. I wanted to seem like somebody. But, you know, every time it came, when push came to shove, I always said no."

The Board decided to parole respondent because of his positive adjustment and despite the atrocity of the murders and respondent's continuing minimization of his involvement in them. He has had no recent discipline problems, having been counseled for the last time in 1992. His only two rule infraction reports were from 1975 and 1980. He had obtained a doctoral degree in philosophy and religion. He had upgraded vocationally in drafting and welding, and had completed various self-help, substance abuse, and religious programs. He taught some parenting and Bible study classes as a peer educator. His work reports and work ethic were excellent. His parole plans were to live with his wife of 25 years and their daughter in San Luis Obispo County where he had an offer to work in landscaping. He also planned to work with his wife in the ministry. The Board noted respondent had no violent criminal history before his life crimes, even

though he had had some run-ins with the law. It noted further that recidivism decreases with age.

The Governor acknowledged respondent's participation in programs, his educational accomplishments, apparently supportive relationships, and parole plans. But he considered the murders in which respondent participated so atrocious that their gravity indicated his current dangerousness, especially because respondent did not fully understand his role in their commission. The Governor considered the evaluator's diagnosis of a personality disorder as an additional concern since many of the diagnosed features contributed to respondent's participation in the murders. The Governor also was concerned about respondent's conformist tendencies, including his association with the American Nazi Party during the early years of his incarceration. He was concerned that respondent had not taken any courses to address self-esteem or assertiveness training to break his self-professed "pattern of choosing the easy route and following along with others," a recent example of which was respondent's willingness to defer to his wife on fiscal and family-related matters. Finally, the Governor noted that respondent's participation in substance abuse programs over the years (1987-1988, 1994-1997, 2002, 2006-2007) had been sporadic and did not demonstrate an adequate commitment to substance abuse treatment upon his release from prison.

The superior court granted respondent's habeas corpus petition and vacated the Governor's decision. It agreed that the life crimes were heinous but noted that they did not indicate current dangerousness in light of respondent's long-standing and positive rehabilitation and his limited participation in the crimes. The court emphasized that despite the personality disorder diagnosis respondent was assessed as low risk. The court rejected the Governor's concern about respondent's lack of insight into his crimes as based on outdated information. The court also rejected the Governor's concerns about respondent's willingness to defer to his wife and about his commitment to sobriety, as the former did not indicate dangerousness and the latter was unsupported because respondent had more than 10 years in treatment, and there was no evidence that he had used drugs since 1974.

This appeal followed. We granted a temporary stay and issued a writ of supersedeas.

DISCUSSION

I

We review de novo a trial court's grant of a habeas corpus petition challenging a parole denial when, as in this case, it is based solely on documentary evidence. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677 (*Rosenkrantz*).) And we review the Governor's decision under the highly deferential "some evidence" standard. (*In re Shaputis* (2011) 53 Cal.4th 192, 221 (*Shaputis II*).)

When a prisoner applies for parole, first the Board then the Governor determines whether the prisoner poses a current threat to public safety. (*Shaputis II, supra,* 53 Cal.4th at p. 220; see also Pen.Code, § 3041). The Governor is required to consider the same parole suitability factors as the Board, including the facts of the life crime, the prisoner's insight into his or her past behavior, and his or her progress while in prison.[3] (*Shaputis II,* at pp. 220-221; *Rosenkrantz, supra,* 29 Cal.4th at pp. 625-626.) The Governor reviews the Board's decision de novo and thus has discretion to resolve evidentiary conflicts, determine the weight to be given to the evidence, and balance the parole suitability factors in a "more stringent or cautious" manner, so long as they are given individualized consideration and the decision is not arbitrary or capricious. (*Id*. at pp. 660, 668, 677.)

Judicial review is limited to determining whether a modicum of evidence in the entire record supports the conclusion that the prisoner is currently dangerous. (*Shaputis II, supra*, at pp. 209, 221.) The court considers "whether there is a rational nexus

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[3] Identical parole suitability criteria apply to murders committed before and after 1978 even though these criteria are listed in two separate sections of the California Code of Regulations. (*In re Shaputis* (2008) 44 Cal.4th 1241, 1256, fn. 13 (*Shaputis I*); Cal. Code Regs., tit. 15, §§ 2281 [parole consideration guidelines for life prisoners]; 2402 [parole consideration criteria for murders committed after Nov. 8, 1978].)

between the evidence and the ultimate determination of current dangerousness" but does not reweigh the evidence. (*Ibid*.) The court may not determine whether or not the prisoner is currently dangerous as that decision is reserved for the executive branch. (*Ibid*.) In other words, "[i]t is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole." (*Rosencranz, supra*, 29 Cal.4th at p. 677.)

II

One of the factors tending to establish unsuitability for parole is that the prisoner "committed the offense in an especially heinous, atrocious, or cruel manner." (Cal. Code Regs., tit. 15, § 2281, subd. (c)(1).) This factor may be present if "(A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense." (*Ibid*.)

The Governor stated that the murders were so heinous that even by themselves they evidence respondent's current dangerousness.[4] He focused on the fact that both victims were "abused, tortured, and mutilated." Respondent does not challenge this characterization of the murders, but he claims that because of his minor role in them, their gravity should not be held against him. We disagree.

The actions of a perpetrator may be imputed to an accomplice for purposes of parole consideration. (*In re Bettencourt* (2007) 156 Cal.App.4th 780, 800, citing *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) To be liable for specific intent crimes committed by the perpetrator, the accomplice must share the perpetrator's specific intent.

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[4] Since the Governor did not rely on this factor alone, his decision does not implicate the holding of *In re Lawrence* (2008) 44 Cal.4th 1181, 1227, that the immutable characteristics of the life crime do not by themselves constitute "some evidence" of current dangerousness.

(*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) Respondent claims that there is no evidence he planned the murder. But he was convicted of first degree murder and conspiracy to commit robbery and murder in Hinman's case, and his actions indicate a greater culpability than he is willing to admit: he was seen in Manson's and Beausoleil's company, armed with the gun that was used in the crime while Beausoleil was armed with a knife; he reportedly said he held the gun on Hinman while Manson mutilated Hinman's face; and he left in Hinman's car after Hinman had been mutilated. The Governor was not required to draw from respondent's actions inferences favorable to respondent or credit respondent's claim that he naively failed to grasp that Hinman was being slowly murdered over the course of four days.

Respondent has acknowledged that he knew of the plan to kill Shea and went along with it. Nothing in his observed behavior or reported statements after that murder indicates that he did not share in the intent to kill Shea, and he is therefore liable for the actions of his accomplices. Notably, in her bid for parole, Leslie Van Houten, a Manson follower who assisted in the murders of Mr. and Mrs. La Bianca on August 9, 1969, but who did not deliver the fatal wounds to either of them, similarly argued that the actions of the perpetrators should not be imputed to her. The court rejected that argument. (*In re Van Houten*, *supra*, 116 Cal.App.4th at p. 365.)

Respondent's own actions provide some of the egregious features of the two murders of which he was convicted. He has all but admitted that he held the gun on Hinman while Manson mutilated Hinman's face. He then left a bleeding and barely conscious Hinman in the company of the three original assailants, thus demonstrating "an exceptionally callous disregard" for Hinman's suffering. A month later, respondent participated in Shea's murder, which involved numerous stabbings of an unarmed and outnumbered victim. Even crediting respondent's version that he made only one cut on Shea's body, that cut was one too many since Shea already had been repeatedly stabbed by others. And if, as respondent has claimed, he believed Shea was already dead, cutting his dead body may have been an act of gratuitous abuse or mutilation. (See *In re Van*

Houten, *supra*, 116 Cal.App.4th at pp. 346, 351 [multiple stab wounds delivered when Van Houten thought Mrs. La Bianca was dead constituted gratuitous mutilation].)

The aggravated circumstances of the life crimes may provide "some evidence" of respondent's current dangerousness when coupled with his reported lack of insight decades after their commission. (*In re Lawrence, supra*, 44 Cal.4th at p. 1228.) "Insight" is not a suitability factor, but it is subsumed under other factors, such as the prisoner's "past and present attitude toward the crime" (Cal. Code Regs., tit. 15, § 2281, subd. (b)) and "the presence of remorse" that indicates understanding of its "nature and magnitude" (§ 2281, subd. (d)(3)). (See *Shaputis II*, *supra*, 53 Cal.4th at p. 219.) A prisoner's insight into the life crime is a significant factor that may change over time and thus "bears more immediately on the ultimate question" whether the prisoner currently poses a risk to public safety. (*Ibid.*) Parole determination generally must be based on the most recent evidence of a prisoner's level of insight. (*Id*. at pp. 219-220.)

Contrary to respondent's contention, the Governor did not rely on dated information about respondent's insight. He reviewed respondent's evolving attitude towards his life crimes, with its attendant factual inconsistencies. He then cited the Board's concern at the 2010 hearing that respondent continued to minimize his role in the murders, and he quoted specifically respondent's statement at the hearing that, he "bragged about it all. Yeah, we cut Shorty's head off. Yeah, I wanted to be impressive. . . . But . . . every time . . . when push came to shove, I always said no." Considering the context in which it was given, this statement may have been intended to affirm respondent's position that he did not cut Shea's head off. The level of exaggeration in it also lends it to the reasonable interpretation that, as late as 2010, and despite his written statement of remorse, respondent still believed that his limited participation was tantamount to a refusal to participate in the murders.

Respondent has insisted over the years, including at the 2010 hearing, that he "just went along" and "didn't have what it took to say no," or was unable to say no because he was afraid of Manson. Yet, he also has insisted that he could in fact say no when, according to him, it mattered—for instance, when he was asked to decapitate Shea. The

Governor could reasonably infer that respondent was still ambivalent about his role in the murders. The Governor may be justifiably cautious about paroling a prisoner who subjectively draws the line only at decapitation. And he may weigh more heavily than the Board the aggravated nature of the murders and respondent's continued inability to understand that he did not refuse to participate when it mattered.[5] (See *Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

The Governor provided a rational nexus between his conclusion that respondent lacked insight into the life crimes, which rendered them relevant to his current dangerousness. He also cited the fact that in 2009 respondent was diagnosed with a personality disorder with narcissistic and anti-social features, and his apparent failure to address his conformist tendencies. Respondent argues that, in light of the evaluator's conclusion that respondent's current risk of violence was low, this diagnosis cannot indicate his current dangerousness.

A psychological assessment of the risk of future violence "bears on the prisoner's suitability for release" (Cal. Code Regs., tit. 15, § 2281, subd. (b)), but the assessment is not binding on the parole authority. (See *In re Lazor* (2009) 172 Cal.App.4th 1185, 1202.) The parole authority's reliance on outdated psychological reports is not "some evidence" of current dangerousness. (*In re Lawrence*, *supra*, 44 Cal.4th at p. 1224.)

The 2009 evaluator summarized the various diagnoses respondent had received over the years, which indicated that respondent had initially been diagnosed with a schizoid personality disorder with anti-social features. The diagnosis morphed into variations of a personality disorder with narcissistic features in the 1988, 1990, 1993, 1997, and 1999 reports. Some evaluators (in 1980, 1985, 1986, 1996, and 1998) opined

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[5] In 2009, respondent told the evaluator that he had declined to participate in the intervening Tate-La Bianca murders on August 8 and 9, 1969. The trial court cited an additional unidentified incident where respondent reportedly refused to participate in a Manson-ordered murder. Respondent's refusal to participate in murders in which he was not charged cannot excuse his participation in the murders with which he was charged and of which he was convicted. Nor does respondent's occasional refusal to participate in a murder amount to a refusal to participate "every time" or "always," as he claimed at the 2010 hearing.

that respondent did not qualify for a diagnosis or did not have a disorder. The issue of a diagnosis was not addressed at all in the 1992, 1994, 2004, and 2006 reports, but in the latter two respondent's violence risk was rated as low to moderate. The 2009 evaluator opined that respondent had a life pattern that pointed to an unspecified personality disorder with narcissistic and antisocial features. The evaluator explained that, to support a diagnosis, a life pattern must be "enduring," "inflexible and pervasive across a broad range of personal and social situations," "stable and of long duration."

The Governor's concern over the latest diagnosis is justifiable in light of the factors the evaluator used to diagnose it, which indicate that it is stable, inflexible and pervasive. This part of the evaluator's report appears to be at odds with the risk assessment portion, where the evaluator finds that respondent has improved over time, and it begs the question whether the evaluator diagnosed a disorder because of respondent's insufficient improvement or because of his prior history. Yet, respondent's case is distinguishable from *In re Lawrence*, *supra*, 44 Cal.4th at p. 1224, where the Governor relied on stale evaluations diagnosing a disorder even though more recent evaluations had consistently found that the prisoner no longer suffered from any psychological problems. No such consistent pattern is evident in this case. The Governor's choice to attach significance to the evaluator's diagnosis, rather than to the low risk assessment, may thus be overly cautious but it is not arbitrary.

The Governor also was concerned about respondent's conformist tendencies and failure to address his self-esteem issues and lack of assertiveness. One point of concern was respondent's one-time in-prison association with the American Nazi Party. Respondent told the 2009 evaluator that members of the Nazi Party in Folsom Prison "took me under their wing" and "made sure I was okay." While there is no evidence in the record indicating any more recent instances of respondent's gravitation to reactionary political groups, the Governor may be justifiably concerned about respondent's repeated associational choices and his tendency to "deny and deflect responsibility" for his actions, which respondent admitted in his written statement to the Board.

The Governor also cited respondent's plan to defer to his wife on fiscal and family-related matters and "just say 'yes ma'am,'" as an example of this problem. By itself, respondent's willingness to defer to his wife's judgment is not evidence of current dangerousness, but it may be indicative of an enduring personality trait that makes respondent particularly vulnerable to outside influence. The Governor concluded that respondent had failed to participate in programs specifically designed to provide self-esteem and assertiveness training. The names of the programs listed in the record do not reveal whether respondent has addressed these issues, and respondent does not argue that he has. We cannot conclude the Governor's view that respondent should do so is arbitrary.

Appellant does not defend the Governor's finding that respondent exhibits insufficient commitment to substance abuse treatment. The evidence in the record indicates that respondent has not used drugs in prison since 1974 and that his drug problem is in remission. He took programs geared towards substance abuse from 1987 to 1988, from 1994 to 1997, in 2002, and from 2006 to 2007. The Governor commended him for currently participating in an Alcoholics Anonymous (AA) program and noted that he had an AA sponsor upon release. The trial court misinterpreted the Governor's concern as relating generally to respondent's commitment to sobriety rather than specifically to abstention from drugs. Respondent follows the trial court's reasoning. Respondent obviously understands that the fact that he has not used drugs while in prison is not sufficient by itself, as he has intermittently participated in substance abuse support programs. Considering that respondent's life crimes were committed at a time of heavy drug use and that the record before the Governor failed to indicate respondent's current commitment to seek support for drug abuse, the Governor's conclusion is not arbitrary.

We find the Governor's conclusion that respondent is still dangerous supported by some evidence on the record before us.

DISPOSITION

The order of the trial court is reversed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.